Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

JERRY R. PIKE, PATRICK A. THOMAS,
Individually and on behalf of others
similarly situated,

Petitioners,

v.

LUCENT TECHNOLOGIES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a plaintiff alleges intentional discrimination in employment, must summary judgment be entered for the employer unless the plaintiff can either

    a. adduce "direct evidence" of discrimination, or

    b. offer evidence showing that the employer's proffered legitimate explanation for its actions is false?

2. Under the Age Discrimination in Employment Act (the "ADEA"), plaintiffs may bring related claims in a single action and the district may permit a defined class of additional plaintiffs to join the case after it has been filed. A case in which this procedure occurs is known as a "collective" ADEA action. In order for an ADEA case to proceed as a collective action, must each original plaintiff file, at the start of the case, a separate "consent to be a party plaintiff" in addition to the complaint?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners are Jerry R. Pike and Patrick A. Thomas, as well as a potential class of all those "similarly situated," within the meaning of 29 U.S.C. § 216(b). That class could, at its broadest probable definition, consist of all management employees of Lucent Technologies over the age of 40 who allege they were subjected to an adverse employment decision in 1999 or 2000 as a result of a forced ranking entitled the "Lucent Talent Review."

Respondent

Respondent is Lucent Technologies, Inc., a publicly traded corporation. Petitioners are unaware of any publicly traded company that owns ten percent or more of respondent's stock.

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the Eleventh Circuit Court of Appeals in this case.

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OPINIONS BELOW

The Eleventh Circuit's order denying the timely petition for rehearing and reconsideration en banc is at App. 1a-2a. The Eleventh Circuit panel decision is at App. 3a-8a. The two district court decisions are at App. 9a-39a and 40a-48a. The panel decision and the district court decisions are unreported.

JURISDICTION

The Eleventh Circuit panel decision was issued March 14, 2003. The Court of Appeals entered an order denying a timely petition for rehearing and rehearing en banc on May 8, 2003.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners brought this action under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (the "ADEA"), and under state age discrimination laws. Petitioners, who had both been long-term employees of respondent and its predecessors, alleged that they were removed from their positions "because of age," within the meaning of the ADEA, 29 U.S.C. § 623(a)(1).

After extensive discovery, respondent moved for summary judgment. In its order on the summary judgment motion, the district court held that petitioners "offer circumstantial evidence that could support an inference of intentional discrimination." App. 30a. It summarized the evidence it found particularly probative of discriminatory intent this way:

> Plaintiffs offer circumstantial evidence that could support an inference of intentional discrimination in the Talent Assessment process and its aftermath. First, there is evidence in the record that top Lucent officials viewed the talent review process as an opportunity to "refresh" the sales force or "refresh the business." In addition, Plaintiffs offer more than one statement by Steven Russell indicating an age bias. These statements include: (1) a statement that he needed "young, ex-military officers;" and (2) a statement in a memorandum that he was "looking to bring on a couple of young, hungry, and smart people leaving military service... to move them into AE vacancies as soon as possible" and make them "the nucleus of a new AE breed." Next, some of Lucent's employees involved in the Talent Assessment indicated that Defendant was looking for younger people and that Steven Russell wanted to surround himself with younger people, Third, written comments about employees often listed youth as a positive characteristic. Plaintiffs also point out that the Talent Review Forms did not contain any objective measures of performance but called on the evaluators to rate the employees' "ability to develop and adapt." Lucent also encouraged the recruitment of recent college graduates because of their flexibility and skill. Finally, Plaintiffs offer statistical evidence that could indicate disparate treatment of employees more than forty-seven or fifty years of age.

App. 30a-31a (record citations omitted).

The district court reiterated that the record evidence created an inference of intentional discrimination:

> The Court notes that the evidence offered by Plaintiffs could support an inference of intentional discrimination.

App. 31a.

Nevertheless, the district court then held that it was bound by Eleventh Circuit precedent to grant summary judgment unless the petitioners also offered additional evidence proving that the non-discriminatory reasons advanced by respondent to explain its treatment of petitioners "did not actually motivate the employer's conduct":

> [T]he ageist comments and statistical evidence in combination were enough to establish Plaintiffs' prima facie case, but, once Defendant has offered legitimate nondiscriminatory reasons for its actions, Plaintiffs must produce additional evidence to show that these reasons did not actually motivate the employer's conduct. The assertions that the Talent Assessment process were [sic] standardless, that the evaluations were manipulated to match the decisions that had been made, that ageist comments had been made, and that statistics could support a finding of discrimination against those employees over forty-seven is not enough to satisfy Plaintiffs [sic] burden of showing pretext.

App. 35a. The court ruled that summary judgment was required because the plaintiffs were unable to show that respondent's explanation necessarily was false. App. 36a-37a.

The district court also addressed the one other way that Eleventh Circuit law would have permitted petitioners to

avoid summary judgment: if they possessed "direct evidence" of discriminatory motive. App. 20a. The district court invoked the stringent, three-part test for "direct evidence" in the Eleventh Circuit. The court held that, to constitute "direct evidence," a statement:

a. must be made by a person involved in the challenged decision;

b. must reflect a discriminatory attitude so blatantly that the only intent could be to discriminate on the basis of age; and

c. must be tied to the adverse employment actions at issue.

App. 20a-25a. The district court held that none of the record evidence met this test for "direct evidence." Id.

The Eleventh Circuit affirmed. Seconding the district court, it held that petitioners could not survive summary judgment without either (a) "direct evidence" of discriminatory motive or (b) evidence showing respondent's explanation to be "false." App. 4a-7a.

The ADEA allows what are known as "collective" actions. In a collective ADEA case, numerous plaintiffs assert related claims in a single civil action; in addition, after the case has begun the district court has the authority to define a class of additional plaintiffs whom it deems to be "similarly situated," and allow them to join the case. Several months prior to granting summary judgment on petitioners' individual claims, the district court ruled that this case could not proceed as a collective action. The court permitted the plaintiffs to continue litigating their own claims, but held it would not

allow additional plaintiffs into the case. The court held that petitioners were not entitled to litigate a collective ADEA case because, when they filed the complaint, they did not also file consent forms, stating that they (the petitioners) agreed to be plaintiffs. App. 40a-47a. The Court of Appeals affirmed this ruling. App. 7a-8a.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S STANDARD FOR SUMMARY JUDGMENT IN AN EMPLOYMENT DISCRIMINATION CASE IS INCONSISTENT WITH THE DECISIONS OF THIS COURT

This Court's splintered decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), spawned a large number of lower court decisions requiring in various circumstances that an employment discrimination plaintiff adduce "direct evidence" of discrimination. In Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003), this Court rejected one line of such direct evidence cases, holding that direct evidence is not required in a Title VII action to shift to the defendant the burden of proof regarding causation in a mixed-motive case. 123 S. Ct. at 2153-55. The Eleventh Circuit decision in the instant case--issued before and without the benefit of this Court's decision in Desert Palace--presents an even more extreme "direct evidence" rule.

The decision below applies well established Eleventh Circuit precedent. Under the controlling standard in that circuit, an employment discrimination plaintiff alleging intentional discrimination cannot survive a motion for summary judgment unless he or she can either (a) adduce substantial evidence that the employer's proffered explanation for the action in question is "false", (App. 6a; see App. 35a),

or (b) offer "direct evidence" that the employer acted with an impermissible motive. (App. 20a-25a). As we explain below, the combined effect of these rules is to require "direct evidence" in any case involving multiple motives, and thus to largely preclude such mixed motive cases from surviving to trial.

A. The Eleventh Circuit's Falsity Requirement Cannot, by Definition, Be Satisfied in A Mixed Motive Case

Of the two methods permitted by the Eleventh Circuit to prove intentional discrimination, one requires that the plaintiff prove that an employer's proffered explanation is "false". (App. 5a). The "employee must meet [the employer's] reason head on and rebut it." (App. 5a, quoting Chapman v. AI Transportation, 229 F. 3d 1012, 1030 (11th Cir 2000)(en banc)).

The specific and demanding elements of this "falsity" method of proof have been repeatedly articulated by Eleventh Circuit decisions. Tidwell v. Carter Products, 135 F. 3d 1422, 1426 (11th Cir. 1998)(plaintiff's must produce evidence "discrediting the employer's proffered reasons")(ADEA); Evans v. McClain of Georgia, Inc., 131 F. 3d 957, 964 (11th Cir. 1997)(plaintiff must adduce evidence "as to the truth or falsity of the employer's legitimate, discriminatory reasons")(Title VII); Combs v. Plantation Patterns, 106 F. 3d 1519, 1529 (plaintiff's evidence must call into question "the truth of each of the employer's proffered reasons"), 1540 (plaintiff must show that proffered explanation "was not a factor that actually motivated" the employer), 1541 (same)(11th Cir. 1997)(Title VII); Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F. 3d 436, 440-41 (11th Cir. 1996)(plaintiff must show that the employer's proffered

reason "was false and that discrimination was the real reason")(ADEA); Cooper-Houston v. Southern Ry. Co., 37 F. 3d 603, 605 (11th Cir. 1994)(plaintiff must adduce evidence that the employer's proffered reasons "were not what actually motivated its conduct.")(Title VII).

This method of proof is certainly a permissible manner of demonstrating the existence of a discriminatory intent. But the utility of this methodology is by definition subject to a serious, often critical, limitation. If a case involves multiple motives, at least one of which is legitimate, the plaintiff necessarily will not be able to prove that all of the employer's proffered explanations were false, or that none of those legitimate explanations were "motivating factors." To the contrary, a mixed motive case is by definition a case in which at least one legitimate explanation is true, and in which at least one such explanation indeed played a motivating role in the disputed action. Thus the very nature of a mixed motive case precludes a plaintiff from using the falsity method of proof.

This inherent unavailability of the "falsity" method of proof in mixed motive cases is of great practical importance. The Congress which adopted the 1991 Civil Rights Act believed that the vast majority of intentional discrimination cases involve just such mixed motives. The House Report, relying in part on the views of the Department of Justice, emphasized that the impact of Price Waterhouse

> is particularly profound because the factual situation at issue in Price Waterhouse is a common one. As the Justice Department correctly observed, "[v]irtually every Title VII disparate treatment case will to some degree entail multiple motives." Brief for the United States as Amicus Curiae.

H.R. Rep. No. 102-40(I), p. 41; S. Rep. No. 101-315, p. 16. In Desert Palace the Chamber of Commerce of the United States made the same point, stressing that "[e]mployment decisions . . . are almost always mixed-motive decisions turning on many factors." Brief Amicus Curiae of the Equal Employment Advisory Council and the Chamber of Commerce of the United States, No. 02-679, p. 20; see id. at 21 (multiple motives are present in "virtually every discrimination case.")

In this case, as in most, this inherent limitation on the falsity standard was fatal to plaintiff's effort to invoke that method of proof. The District Court repeatedly concluded that the plaintiffs' evidence "could support an inference of intentional discrimination." (App. 30a, 31a). But under Eleventh Circuit precedent that simply was not sufficient. To invoke the falsity method of proof, the plaintiff was obligated to "produce additional evidence to show that these [proffered legitimate] reasons did not actually motivate the employer's conduct." (App. 35a-36a)(Emphasis added); see id. at 35a (plaintiff must show "that the employer's reasons did not in truth motivate his conduct.") That showing by definition could not be made in a case involving multiple motives. Thus the falsity method of proof required a demonstration that this was one of the rare cases involving only a single motive. Here, as in most cases, evidence precluding the possible existence of multiple motives could not be adduced.

B. The Decision Below Requires Proof of "Direct Evidence" of Discrimination in Any Mixed Motive Case

In a mixed-motive case, the falsity method of proof is not available. The only alternative method of proof permitted by the Eleventh Circuit is "direct evidence."

The Eleventh Circuit "direct evidence" requirement is far more draconian than the direct evidence rule rejected in Desert Palace. The decisions overturned by this Court in Desert Palace had only required a plaintiff to adduce direct evidence if he or she wished to shift to the defendant the burden of proof regarding causation. But the absence of direct evidence was not fatal to the claims of a plaintiff in a mixed motive case. Even under those now-disapproved decisions, a plaintiff who lacked direct evidence could still rely on other types of evidence to establish the existence of an impermissible motive and to show causation.

In the Eleventh Circuit, however, the absence of direct evidence is necessarily fatal in a mixed motive case. Where a plaintiff cannot establish falsity, an approach impossible where mixed motives are present, the only method of proof that remains in the Eleventh Circuit is "direct evidence." Absent direct evidence, the issue of causation would not even arise in the Eleventh Circuit, because there would be no way to prove the existence of an impermissible motive.

The Eleventh Circuit's formulation of what constitutes "direct evidence" is essentially the same narrowly restricted definition unsuccessfully proposed by the employer in Desert Palace.[1] To satisfy the Eleventh Circuit's direct evidence requirement, a plaintiff must offer evidence of statements by the very person who made the disputed decision, the statements must be utterly unambiguous in announcing a discriminatory motive, and that motive must be directly

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[1] Brief of Petitioner, Desert Palace, Inc. v. Costa, p. 40-41, 42 ("[E]vidence is "direct"....when it consists of [1] statements by a decisionmaker [2] that directly reflect the alleged animus and [3] bear squarely on the contested employment decision....").

connected to the very employment action at issue in the case.[2] That was the exceedingly demanding standard applied by the district court (App. 20a-26a), urged by the employer on appeal[3], and invoked by the court of appeals. (App. 4a-5a).

The Eleventh Circuit has candidly acknowledged that even in cases of unlawful discrimination it will only rarely be possible to find such direct evidence. Merritt v. Dillard Paper Co., 120 F.3d 1181, 1191 (11th Cir. 1997)("The present case is the exception, the rare case where there is direct evidence of retaliatory motive"); Rollins v. TechSOUTH, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987)("It is rare that direct evidence of discrimination exists"); Perryman v. Johnson Products Co, Inc., 698 F.2d 1138, 1143 (11th Cir. 1983)("[S]ome plaintiffs are able to prove the existence of discriminatory intent by direct evidence; in these rare cases, . . . a presumption is created that the adverse employment

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[2] Standard v. A.B.E.L. Services, Inc., 161 F.3d 1318, 133. (11th Cir. 1998); Carter v. Three Springs Residential Treatment, 132 F.3d 635, 642 (11th Cir. 1998); Burrell v. Board of Trustees of Georgia Military College, 125 F.3d 1390, 1393-94 (11th Cir. 1997).

[3] Brief of Appellee, Pike v. Lucent Technologies, Inc., No. 02-14878AA, p.27 ("'Direct evidence is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption.' Standard v. A.B.E.L. Svcs., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998). '[R]emarks by non-decision makers or remarks unrelated to the decision-making process itself are not direct evidence of discrimination.' Id. In addition, comments which are open to more than one interpretation or which require the court to take an additional inferential step do not constitute direct evidence.")

action taken against the plaintiff was a product of that discriminatory intent").

C. The Decision Below Is Inconsistent With The Decisions of This Court in Desert Palace, Inc. v. Costa, 123 S. Ct. 2146 (2003), and in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

The Eleventh Circuit's insistence that a plaintiff adduce "direct evidence" in a mixed motive case is squarely inconsistent with the reasoning of this Court's subsequent decision in Desert Palace. Even where a plaintiff cannot show falsity, there is a wide range of circumstantial evidence short of "direct evidence" (however it might be defined) that would be sufficient to demonstrate the presence of an impermissible motive. The Eleventh Circuit's requirement that a plaintiff must either demonstrate falsity or adduce "direct evidence" precludes proof of discrimination by reliance, instead, on such other types of proof.

Desert Palace emphatically rejected treating direct evidence differently from other types of evidence; such a requirement, the Court explained, is an unjustifiable departure from the "[c]onventional rul[e] of civil litigation." 123 S. Ct. at 2154, quoting Price Waterhouse, 490 U.S. at 253 (plurality opinion).

> That rule requires a plaintiff to prove his case "by a preponderance of the evidence," ibid., using "direct or circumstantial evidence." Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 714 n. 3 (1983). We have often acknowledged the utility of circumstantial evidence in discrimination cases. . . . The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted:

> "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 508, n. 17 (1957). . . . [N]either petitioner nor its amici curiae can point to any other circumstance in which we have restricted a litigant to the presentation of direct evidence absent some affirmative directive in a statute.

123 S. Ct. at 2154. In mixed-motive cases the Eleventh Circuit imposes precisely the type of restriction rejected by this Court in Desert Palace.

If applied to the circumstances of Desert Palace itself, the Eleventh Circuit standard would have required entry of judgment as a matter of law in favor of the employer in that case. The jury verdict in Desert Palace concluded, not only that gender was a motivating factor, but also that the defendant's "treatment of plaintiff was motivated by . . . a lawful reason." (No. 02-679, App. 40). That verdict meant that the explanation proffered by Desert Palace (that Costa was involved in a physical confrontation and that she had a prior disciplinary record) was true, and was a motivating factor. In the Eleventh Circuit such a verdict would have been fatal to Costa's claim, because the verdict precluded use of the falsity method of proof, and because Costa did not have the sort of "direct evidence" required by the Eleventh Circuit.

The Eleventh Circuit decision is in practice equally inconsistent with all of the opinions in Price Waterhouse. In a mixed motive case, a plaintiff (by definition) cannot prove that some legitimate factor was neither present nor a motivating consideration, and (as the Eleventh Circuit itself acknowledges) the plaintiff will only rarely be able to adduce "direct evidence." Thus in most mixed motive cases it would

as a practical matter be impossible under the Eleventh Circuit standard to defeat a motion for summary judgment. Where an employer would not have taken a disputed adverse action but for the existence of a discriminatory purpose, each of the opinions in Price Waterhouse agreed that that employer's conduct was unlawful, regardless of whether some other legitimate motive was also present. Price Waterhouse v. Hopkins, 490 U.S. at 241 (plurality opinion), 259 (concurring opinion of Justice White), 278 (concurring opinion of Justice O'Connor), 284 (dissenting opinion of Justice Kennedy). But under the decisions of the Eleventh Circuit, the presence of that legitimate motive (because it precludes use of the falsity method) often makes proof of such illegality impossible.

II. THERE EXISTS A SPLIT IN THE CIRCUITS AS TO WHETHER PLAINTIFFS MUST FILE A CONSENT FORM IN ADDITION TO THE COMPLAINT IN ORDER TO LITIGATE A "COLLECTIVE" ADEA ACTION.

The ADEA allows what are known as "collective" actions. In a collective ADEA case, numerous plaintiffs assert related claims in a single civil action; in addition, after the case has begun the district court has the authority to define a class of additional plaintiffs whom it deems to be "similarly situated," and allow them to join the case. This Court has specifically approved this procedure, holding that Congressional policy favors the collective litigation of age discrimination claims:

> The ADEA . . . . expressly authorizes employees to bring collective age discrimination actions "in behalf of ... themselves and other employees similarly situated." 29 U.S.C. § 216(b) (1982 ed.). Congress has stated its policy that ADEA plaintiffs should have

the opportunity to proceed collectively.

Hoffmann-LaRoche, Inc. v. Sperling, 493 U.S. 165, 170 (1989).

The district court ruled that additional plaintiffs could not join the case because petitioners, when they filed the complaint, did not also file consent forms, stating that they (the petitioners) agreed to be plaintiffs. App. 40a-47a. The Court of Appeals affirmed this ruling, holding the consents were required under a previous Eleventh Circuit decision, Grayson v. Kmart Corp., 79 F.3d 1086, 1106 (11th Cir. 1996). App. 7a-8a.

The Eleventh Circuit is the only circuit to require the filing of consents in order to proceed with a collective ADEA action.[4] At one point, this view was shared by the Eighth

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[4] The procedural device of requiring both a complaint and separate consents is found in the Fair Labor Standards Act (the "FLSA"). The FLSA contains a provision, found at 29 U.S.C. § 256, which requires the consents in overtime and minimum wage cases. It states,

> In determining when an action is commenced for the purposes of section 255 of this title, an action . . . shall be considered commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act . . ., it shall be considered to be commenced in the case of any individual claimant –
>
> (a) on the date when the complaint . . . . and his written consent to become a party petitioner is filed.

The ADEA expressly incorporates several, but not all, procedural

Circuit. O'Connell v. Champion International Corp., 812 F.2d 393 (8th Cir. 1987). The Eight Circuit, however, has since held that the requirement was eliminated as a result of the Civil Rights Act of 1991. Anderson v. Unisys Corp., 47 F.3d 302, 308-09 (8th Cir. 1995). The Third Circuit and a number of district courts have always held that separate consents are not required. Sperling v. Hoffman-LaRoche, Inc., 24 F.3d 463, 467 (3d Cir. 1994); see In re: Western District Xerox Litigation, 850 F. Supp. 1079 (W.D.N.Y. 1994).

The Eleventh Circuit rule serves no practical purpose and advances no public policy. By imposing a formality that is nowhere required by the statutory language of the ADEA, it lays a trap for the unwary and undermines Congress' determination "that ADEA plaintiffs should have the opportunity to proceed collectively." Hoffmann-LaRoche, Inc. v. Sperling, 493 U.S. at 170.

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provisions of the FLSA. Section 256, quoted immediately above, is not among those portions of the FLSA that are incorporated by the ADEA. The provisions of the FLSA that are expressly incorporated by the ADEA are listed in 29 U.S.C. § 626. The Court of Appeals held that section 256 is nevertheless impliedly incorporated into the ADEA. App. 7a-8a.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the court of appeals. In the alternative, the Court should grant the writ, vacate the decision below, and remand the case for further consideration in light of Desert Palace, Inc. v. Costa.

Respectfully Submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-14878-AA

[Filed May 8, 2003]

JERRY R. PIKE, PATRICK A. THOMAS, Individually and on behalf of others similarly situated,	)
Plaintiffs-Appellants,	)
versus	)
LUCENT TECHNOLOGIES, INC.,	)
Defendant-Appellee.	)

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, F.2d ___) .

Before: TJOFLAT, BIRCH and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ _____
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-14878
Non-Argument Calendar

D.C. Docket No. 00-01406-CV-RWS-1

[Filed March 14, 2003]

JERRY R. PIKE, PATRICK A. THOMAS Individually and on behalf of others similarly situated,	)
Plaintiffs-Appellants,	)
versus	)
LUCENT TECHNOLOGIES, INC.,	)
Defendant-Appellee.	)

Appeal from the United States District Court
for the Northern District of Georgia

Before TJOFLAT, BIRCH and HULL, Circuit Judges.

PER CURIAM:

Jerry Pike and Patrick Thomas ("the plaintiffs") appeal the district court's grant of summary judgment to Lucent Technologies ("Lucent") on their age discrimination claims, filed pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621-34. They challenge two of the district court's decisions with regard to summary judgment: (1) the district court's ruling that the plaintiffs did not present direct evidence of discrimination, and (2) the district court's ruling that the plaintiffs failed to present sufficient evidence to rebut Lucent's proffered reasons as pretextual. The plaintiffs also appeal the district court's order dismissing their collective action claims. After review, we affirm.[1]

I. SUMMARY JUDGMENT

First, we find no merit to the plaintiffs' assertion that they presented direct evidence of discrimination in the form of statements made by two Lucent managers, Craig Hixon and Steven Russell. Hixon's "old bug", comment does not constitute direct evidence of discrimination because he was not a decisionmaker involved in the challenged decisions. See Trotter v. Bd. of Trustees, 91 F.3d 1449, 1453-54 (11thCir. 1996) ("For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision."). Russell's comments stating a desire to attract younger employees, while perhaps circumstantial evidence of Russell's age bias, do not amount to direct evidence because his comments still require

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[1] This Court reviews a district court's grant of summary judgment de novo, viewing the evidence in the light most favorable to the party opposing the motion. See Patrick v. Floyd Med. Ctr., 201 F.3d 1313, 1315 (11th Cir. 2000).

the factfinder to infer that Russell's preference for younger employees motivated the decisions to rank both plaintiffs in the bottom 10% of the company's sales team in the Talent Assessment, to transfer Thomas, and to terminate Pike. See Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1359 (11th Cir. 1999) (holding that decisionmaker's comment that the company needed to promote "aggressive young men" was not direct evidence of age discrimination).[2]

Second, with regard to pretext, the plaintiffs failed to rebut "head on" Lucent's legitimate, nondiscriminatory reasons for their actions, namely that Lucent's managers believed that the plaintiffs compared unfavorably in certain areas to other sales team members. See Chapman v. AI Transp., 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc) ("Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason.").[3] The

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[2] This Court has concluded that statements praising the young, when coupled with derogatory remarks about older workers, Buckley v. Hosp. Corp. of Am., Inc., 758 F.2d 1525, 1530 (11th Cir. 1985), and derogatory statements about protected workers alone, Wright v. Southland Corp., 187 F.3d 1287, 1303 (11th Cir. 1999), can be direct evidence of a discriminatory motive, but there is no evidence that Russell made derogatory statements about older workers.

[3] This is also true of Pike's discharge as part of a reduction in force. Lucent managers chose to terminate Pike over the other sales team member from the South Florida office, Rick Gomez. Pike failed to present evidence that he had more ONG knowledge or better client relations with BellSouth than Gomez, the reasons

record reflects that both plaintiffs consistently received good performance evaluations and praise from their managers. However, there is no evidence of the performance evaluations and feedback of other sales teams members. Thus, the evidence of the plaintiffs' evaluations is insufficient to show that the plaintiffs compared favorably to other sales team members in these areas in order to conclude that Lucent's reason was false.[4]

Finally, we reject the plaintiffs contention that the district court held them to a higher burden of proof of pretext than that required by the McDonnell Douglas framework. The district court did not discount or exclude the plaintiffs' evidence from their prima facie case when considering whether the plaintiffs had presented sufficient evidence to find

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specifically relied upon by the managers who decided to discharge Pike rather than Gomez.

[4] Pike submitted evidence suggesting that he was superior to other account executives in that he was on target to meet or exceed a higher percentage of his mid-1999 year goals than any other account executive. However, for an inference of discrimination to arise, the plaintiff must make a strong showing of disparity in qualifications. Denny v. City of Albany, 247 F.3d 1172, 1187 (11th Cir. 2001). Even taking as fact that Pike was on target to reach a higher percentage of his goals than any other account executive, he still failed to make a strong showing of a disparity in qualifications. The Talent Assessment conducted by Lucent's C-level managers was not based strictly on the current production numbers, but took into account all the information the managers knew. Therefore, Pike would have had to show that his production numbers had been higher for a considerable period of time, not just the limited mid-1999 time period.

pretext. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (noting that, although the presumption of discrimination that arises from the prima facie case falls away when the defendant meets its burden of producing a legitimate, nondiscriminatory reason, the factfinder may still consider the evidence establishing the plaintiff s prima facie case on the issue of pretext). Instead, the district Court merely found that this evidence, though sufficient to establish the prima facie case, was not sufficient to permit a reasonable jury to find pretext.

II. DISMISSAL OF COLLECTIVE ACTION

The plaintiffs argue that the district court erroneously dismissed their collective action claims for failure to file written consent to become a party plaintiff within ninety days of receiving their right to sue letter from the EEOC, as required by 29 U.S.C. § 256. The plaintiffs contend that § 256 is inapplicable to ADEA claims after the passage of the Civil Rights Act of 1991 ("CRA"), Pub. L. No. 102-166, § 115, 105 Stat. 1071 (1991). After review, we conclude that the district court properly dismissed the plaintiffs' collective action claims.[5]

This Court has previously stated that "[t]he legislative history of both § 216(b) and the ADEA show that Congress meant for ADEA actions to be governed by the tolling principle of § 256 of the FLSA." Grayson v. Kmart Corp., 79

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[5] This Court reviews de novo a grant of a motion to dismiss under 12(b)(6) for failure to state a claim. See Shands Teaching Hosp. & Clinics. Inc. v. Beech St. Corp., 208 F.3d 1308, 1310 (11th Cir. 2000).

F.3d 1086, 1106 (11th Cir. 1996). Pursuant to § 256, a collective action is commenced when a named plaintiff files both a complaint and a written consent to become a party plaintiff. 29 U.S.C. § 256(a).

Plaintiffs assert that Grayson is limited to only pre-CRA ADEA claims. We disagree. In a footnote, Grayson limits to pre-CRA claims its specific holding that a putative plaintiff must opt-in by filing his or her written consent before the statute of limitations on the ADEA claim expires. However, this is due to the fact that the CRA replaced the former two- and three-year statutes of limitations found in the Fair Labor Standards Act, 29 U.S.C. § 255, and originally applicable to ADEA claims, with a ninety-day period following the EEOC right to sue notice within which to begin an ADEA action. The CRA did not change the procedure for commencing a class or collective action under the ADEA. See Grayson, 79 F.3d at 1107 n.39. This Court's overall conclusion that § 256, and not Rule 23, governs ADEA collective action claims was not affected by the CRA. Therefore, because Plaintiffs failed to file written consents to become party plaintiffs, they failed to satisfy the statutory requirement necessary to prosecute a collective action and the district court did not err in dismissing their collective action claims.

III. CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in granting summary judgment or dismissing the plaintiffs' collective action claims.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 1 00-CV- 1406-RWS

[Filed August 23, 2002]

JERRY R. PIKE and PATRICK A. THOMAS, Individually and on behalf of others similarly situated,	)
Plaintiffs,	)
v.	)
LUCENT TECHNOLOGIES, INC.,	)
Defendant.	)

ORDER

Plaintiffs bring this action under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., ("the ADEA") and under state age discrimination laws. According to Plaintiffs, they were victims of a purge of older managers by Defendant. Now, before the Court for consideration are Defendant's Motion for Summary Judgment on Plaintiff Thomas' Claims [41-1], Defendant's Motion for Summary

Judgment on Plaintiff Pike's Claims [42-1], Defendant's Motion To Strike Supplemental Report of Dr. John Miller [52-1], Defendant's Motion for Reimbursement of Costs for Expert Databases [57-1], and Plaintiffs' Motion To Strike Defendant's Reply to Plaintiffs' Joint Statement of Material Facts [62-1]. After extensively reviewing the record and carefully considering the arguments of the parties, the Court enters the following Order.

FACTUAL BACKGROUND

The following facts are undisputed. Lucent Technologies, Inc. ("Lucent") is a corporation that manufactures and sells telecommunications equipment and provides related services to companies in the industry. In 1987, Plaintiff Pike became a sales account executive on Lucent's BellSouth Customer Team ("BSCT") in West Palm Beach, Florida. In 1990, Plaintiff Thomas became a sales account executive on Lucent's BSCT in Louisville, Kentucky. The BSCT and BellSouth were both headquartered in Atlanta. Plaintiffs Pike, Thomas, and the other account executives located outside headquarters were referred to as "field sales" account executives. These field sales account executives were expected to sell Lucent products to the network planners, construction personnel, and engineers in their assigned markets. The BSCT account executives were categorized into groups such as the Network Products Group ("NPG") and the Optical Networks Group ("ONG") according to the type of products they sold. In the 1990s, BellSouth began to shift its focus to the optical network products because they were more technically sophisticated and could carry a greater amount of information at a greater speed than the network products.

When Pike became a BSCT account executive, he primarily was responsible for selling NPG products in southern Florida. At the time, Dave Collins supervised Pike, and he remained Pike's supervisor for more than two years. Evidence in the record indicates that Collins was disappointed by Pike's performance, but Plaintiff Pike points out that there is no documentation of Collins' concerns. In addition, Pike says that Collins admitted that he did not have problems with Pike's performance.

In November 1998, George Dunlap replaced Collins as Pike's supervisor. According to Dunlap, Collins met with Dunlap to discuss the performance of the account executives and Collins gave Pike a low rating, citing several specific reasons. Pike submits that this meeting between Dunlap and Collins never occurred and that Collins never indicated that he was displeased with Pike's performance.

When Plaintiff Thomas became a BSCT account executive; he was responsible for selling NPG products in Kentucky. In 1996, Thomas assumed responsibility for ONG sales in Kentucky. At that time, Thomas was under the, supervision of Dennis Beck. Lucent provided training about ONG products, but the parties dispute whether Thomas ever became sufficiently familiar with these products to sell them effectively. The parties also disagree about whether Thomas' supervisors informed Thomas that his knowledge of ONG products was lacking. In 1997, George Dunlap became the sales manager in charge of Kentucky and Thomas' supervisor. While Defendant asserts that Mr. Beck discussed the account executives' performance with Mr. Dunlap, Plaintiff Thomas disputes this statement. According to Thomas, the evidence

does not support Defendant's contention that Thomas performed poorly.

In August 1998, Steven Russell became the Sales Vice President responsible for the BSCT. Shortly after he received this position, the BSCT sales managers met with Russell and discussed the performance of the account executives. There is evidence in the record to indicate that Dunlap characterized Plaintiffs Pike and Thomas as his weakest account executives. However, Pike argues that Dunlap had too little experience with Pike to characterize his performance, and there is evidence showing that Dunlap previously had rated Thomas' performance as "excellent."

In March 1999, Sales Manager Don Smith took over responsibility for Kentucky and became Thomas' supervisor. Although Defendant states that Dunlap discussed Thomas' inadequate performance with Smith, other evidence in the record shows that Dunlap praised Thomas' performance and that Dunlap never offered significant criticism of Thomas' work. Smith specifically describes Thomas' shortcomings, but Thomas rebuts Smith's testimony with his opinion that his performance was adequate and that Smith's criticisms were unfounded.

In March 1999, Lucent initiated a Talent Assessment process during which the sales managers were asked to evaluate the employees' skills and past performance. During this process, the sales managers identified the top ten percent and bottom ten percent of account executives. At the end of this process, the BSCT developed action plans for the top and bottom performers. Actions taken for the bottom performers included performance improvement, transfers to other

positions, or termination. Plaintiffs Pike and Thomas were ranked in the bottom ten percent during the Talent Assessment. The bottom ten percent list ultimately was reviewed and approved by Steven Russell and his supervisor, Carole Spurrier.

After the Talent Assessment, the action plan assigned to Plaintiff Pike was the "Resignation from Service" ("RFS") program. Plaintiff Pike did not accept the severence benefits offered under the RFS program. Instead, Pike joined the Sales Realization Organization, and Defendant states that Pike did not accomplish anything during his time in the Sales Realization Organization. According to Pike, Defendant assigned no duties to him after he joined the Sales Realization Organization. Plaintiff Pike was dissatisfied with his new assignment, and he requested and obtained a transfer back to field sales. Defendant subsequently decided to reduce its sales force and Plaintiff Pike was offered a severence package, which he declined. Plaintiff Pike's employment ended in March 2000, and he was not replaced.

In July 1999, after the Talent Assessment process, Plaintiff Thomas transferred to another department, and no one was hired to replace him. His account executive duties were assumed by Dixie Riddle and George Knieriem, who were both older than Thomas. Subsequently, Plaintiff Thomas resigned as part of an early retirement program.

DISCUSSION

Motions To Strike

The Court first considers the two pending motions to strike. First, Defendant moves to strike the supplemental report of Plaintiffs' expert John Miller. According to Defendant, the supplemental report is a completely new expert report, and it should be stricken because it was not disclosed during discovery. Defendant contends that the information forming the basis for Dr. Miller's revised report was disclosed to Plaintiffs in paper format as early as January 2001. Plaintiffs' expert did not analyze this data until after the Court ordered Defendant to produce the data in electronic format to allow Plaintiffs' expert to check the defense expert's work. Although Defendant had an opportunity to depose Dr. Miller, that deposition occurred before the disclosure of Dr. Miller's most recent report, which was filed as part of Plaintiffs' response to Defendant's motions for summary judgment. Now Defendant argues that Plaintiffs have appropriated the work product of the defense expert, Dr. White, and used Defendant's electronic database, not to check the expert's work, but to create an entirely new expert report at Defendant's expense. In addition, Defendant argues that Dr. Miller's analysis does more than check Dr. White's work because Dr. Miller used the electronic databases only to analyze select employment decisions and used age breaks not considered in Dr. White's report. For these reasons, Defendant asks the Court to strike the new report from the record because Plaintiffs have violated the rules requiring disclosure of expert reports during discovery.

Plaintiffs counter that they only received Dr. White's report a week before discovery closed; therefore, Plaintiffs could not produce a rebuttal report until after the close of discovery. Plaintiffs also accuse Defendant of concealing the identity of its expert until the discovery period was almost over. Furthermore, Plaintiffs argue that Dr. White's report was not a rebuttal report but an independent analysis and that the supplemental report of Dr. Miller was necessary to answer Dr. White's claim that the statistics showed no pattern of adverse treatment regardless of the age break used for the calculations.

The series of events described by the parties is simply the process inherent in any "battle of experts." Both parties have engaged experts, and both experts formulated their own opinions and questioned the conclusions reached by the other expert. Characterizing this give and take as "new" or "rebuttal" opinions accomplishes little. The Court will allow both parties to use the reports generated by their experts in an effort to prove their cases. Accordingly, Defendant's Motion To Strike Supplemental Report of Dr. John Miller [52-1] is hereby **DENIED**.

Second, Plaintiffs move to strike Defendant's reply to Plaintiffs' Joint Statement of Material Facts. Plaintiff argues that this reply allowed Defendants to submit fifty additional pages of argument. The Local Rules of this Court require the respondent to a motion for summary judgment: (1) to file a statement of material facts to which the respondent contends there remains a genuine issue of material fact to be tried and (2) to respond to the movant's statement of undisputed material facts. LR 56.1(B)(2), NDGa. The rules make no specific provision for the movant's obligations in the reply.

Replying to Plaintiff's enumerated disputed facts as Defendant chose to do is neither proscribed by the Local Rules nor unreasonable. While Defendant's reply is likely unnecessarily voluminous, the Court does not find it improper, and will not strike it. Accordingly, Plaintiffs' Motion To Strike Defendant's Reply to Plaintiffs' Joint Statement of Material Facts [62-1] is hereby **DENIED.**

Motion for Reimbursement of Costs for Expert Databases

When the Court ordered Defendant to produce the electronic databases created by its expert to Plaintiff, the Court indicated that the issue of reimbursement of some of Defendant's costs for creating those databases could be warranted. (Order, Jan. 11, 2002, at 2 [46-1].) Defendant now requests that the Court order Plaintiffs to share these expenses. Defendant has requested $5,950.00 as Plaintiffs' share of these costs. In calculating this figure, Defendant excludes the cost of creating any database not relied upon in Plaintiffs' expert's report, and Defendant seeks to recover only half of the cost of creating the databases upon which Plaintiffs' expert did rely. The Court finds that the fee for Defendant's expert was reasonable and that the defense expert's staff did not possess more expertise than necessary to create the database. Plaintiffs have requested an offset for the cost of creating the databases that Plaintiffs' expert produced. As explained above, Defendant asserts that, although all of the defense expert's electronic databases were made available to Plaintiffs' expert for examination, the amount requested excludes the cost of any database that Plaintiff did not rely upon expressly in producing his supplemental report. In light of this concession by Defendant; the Court finds that no

further offset is necessary. Defendant's Motion for Reimbursement of Costs for Expert Databases [57-1] is hereby **GRANTED**, and Plaintiffs are hereby **ORDERED** to remit $5,950.00 to Defendant to satisfy their share of the cost of creating the databases used by both parties. Defendant also requests attorney's fees on this motion, but the Court will not require Plaintiffs to pay attorney's fees.

Motions for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that a district court shall grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is (1) no genuine issue as to any material fact and that (2) the moving party is entitled to judgment as a matter of law." The moving party bears the burden of showing the absence of a genuine issue as to any material fact. The applicable substantive law identifies which facts are material, and a fact is not material if a dispute over that fact will not affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 247, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant. 477 U.S. at 249-50. The Court must view the materials submitted in favor of the motion in the light most favorable to the non-moving party. Adickes v. S.J. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 142 (1970).

When the nonmovant has the burden of proof at trial, the movant may carry its burden at summary judgment by demonstrating the absence of an essential element of the

nonmovant's claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986), In determining whether the movant has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the nonmovant. Anderson, 477 U.S. at 255. If the movant meets this burden, the nonmovant then has the burden of showing that summary judgment is not appropriate by setting forth "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party cannot rely on the pleadings, but must file a response which includes other evidence showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); see Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (stating that non-movant must come forward with "specific facts" showing genuine issue for trial); Combs v. Plantation Patterns, 106 F.3d 1519, 1526 (11th Cir. 1997). Mere conclusory allegations and assertions are insufficient to create a disputed issue of material fact. Earley v. Champion Int'l Corp., 907 F. 2d 1077, 1081 (11th Cir. 1990); Mack v. W.R. Grace Co., 578 F. Supp. 626, 630 (N.D. Ga. 1983).

In the present case, Plaintiffs have alleged age discrimination in employment. The ADEA provides, "It is unlawful for an employer... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Generally, plaintiffs alleging employment discrimination can seek to hold defendants liable under a disparate treatment or a disparate impact theory. Under the ADEA, the United States Court of Appeals for the Eleventh Circuit has held that the a disparate

impact claim under the ADEA is not a cognizable claim.[1] Adams v. Fla. Power Corp., 255 F.3d 1322, 1325-26 (11th Cir. 2001), cert. dismissed, - U.S.- , 122 S. Ct. 1290, 152 L. Ed. 2d 345 (2002). Therefore, Plaintiffs must proceed under a disparate treatment theory. A disparate impact claim is easier to prove since liability can be premised on a specific facialiy neutral employment practice which has had an adverse impact on members of the protected class. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994, 108 S. Ct. 2777, 2788, 101 L. Ed. 2d 827 (1988). Something more is required for a disparate treatment claim-the plaintiff must show discriminatory intent with direct or circumstantial evidence. See Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001) (noting that proof of discriminatory intent is required for claim of disparate treatment); Armstrong v. Flowers Hosp., Inc., 33 F.3d 1308, 1313 (11th Cir. 1994) (stating that plaintiff alleging disparate treatment claim must

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[1] Several circuits have held that no disparate impact claim exists pursuant to the ADEA. Miller v. City of Indianapolis, 281 F.3d 648, 651 (7th Cir. 2002); Mullin v. Raytheon Co., 164 F.3d 696, 704 (lst Cir. 1999); Furr v. Seagate Technology, Inc., 82 F.3d 980, 987 (10th Cir. 1996); see also DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732 (3rd Cir. 1995) (doubting viability of disparate impact theory under the ADEA). For authority recognizing a disparate impact claim under ADEA, see Byrnie v. Town of Cromwell Bd. of Educ., 243 F.3d 93, 111 (2nd Cir. 2001), Evers v. Alliant Techsystems, Inc., 241 F.3d 948, 953 (8th Cir. 2001); Smith v. Xerox Corp., 196 F.3d 358,365 (2nd Cir. 1999);. The Supreme Court declined to resolve the disagreement among the circuits when, after hearing oral arguments, the justices dismissed as improvidently granted the writ of certiorari in Adams. 122 S. Ct. 1290 (2002).

demonstrate that employer intended to discriminate against protected group).

I. Whether Plaintiffs Can Establish Their Claims Using Direct Evidence

In an employment discrimination action based on direct evidence, when a plaintiff produces direct evidence of discrimination, the employer must prove by a preponderance of the evidence that the same decision would have been made in the absence of the illegitimate criterion or protected characteristic. Evans v. McClain of Georgia, Inc., 131 F, 3d 957, 961 (11th Cir. 1997) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 258, 109 S. Ct. 1775, 1795, 104 L. Ed. 2d 268 (1989). In other words, if direct evidence of discrimination is presented, the burden of persuasion shifts to the defendant.

Under Eleventh Circuit precedent, a statement by a decisionmaker reflecting a discriminatory attitude "ties the discriminatory attitude to the relevant employment decision;" therefore, such a statement is direct evidence of discrimination. Wright v. Southland Corp.,187 F. 3d 1287 (11th Cir. 1999). To qualify as direct evidence, the statement must be made by a decisionmaker, reflect a discriminatory attitude, and be related to an adverse action against an employee with a protected characteristic. See Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1330 (11th Cir.1998) ("remarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not direct evidence of discrimination.") (citations omitted); Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d t354, 1359 (11th Cir.1999) (stating that evidence must indicate that the

employment decision was motivated by the decisionmaker's negative attitude about age); Carter v. Three Springs Residential Treatment, 132 F.3d 635, 642 (11th Cir. 1998) (opining that statement must relate directly to adverse action taken against employee possessing protected characteristic). Evidence that merely suggests a discriminatory motive is not direct evidence. Burrell v. Bd. of Trustees of Ga. Military College, 125 F.3d 1390, 1393-94 (11th Cir. 1997). Moreover, "only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age... constitute direct evidence of discrimination." Damon, 196 F.3d at 1359 (citations omitted); see also Carter, 132 F.3d at 642 (citing Harris v. Shelby County Bd. of Educ., 99 F.3d 1078, 1083 n. 2 (11th Cir. 1996) and noting that statements open to more than one interpretation do not constitute direct evidence of discrimination).

Plaintiffs contend that the following statements constitute direct evidence of discrimination. First, according to Mike Chancey, Craig Hixson told him that Lucent's motivation for Lucent's eliminations was "the fact that you guys are old bugs." (Chancey Dec. ¶ 16.) Second, Steven Russell reportedly stated that he needed "young, ex-military officers." (Knieriem Dec. ¶ 5; Chancey Dec. ¶ 5-8.) In addition, Mr. Russell stated in a memorandum, "I am looking to bring on a couple of young, hungry, and smart people leaving military service... to move them into AE vacancies as soon as possible... I would like to bring them on board to become the nucleus of a new AE breed." (Chance Dep. at 106-107; Ex. 36.) Allegedly, Clarence Harris told Plaintiff Pike that Pike's future with Defendant was in danger because the company was looking for younger people, indicating that Steven Russell wanted to surround himself with younger people. (Pike Interr.

Resp., Ex. K.) Finally, Plaintiffs assert that written comments about employees repeatedly listed youth as a positive characteristic. (See, e.g., Dunlap Dep., Ex, 36 (Talent Review Profiles of John P. Jones, Darren Durrett, and Brian Bouck).)

The Court initially determines who the decisionmakers were with regard to the alleged adverse employment actions against Plaintiffs. Allegedly, Plaintiff Pike suffered two adverse employment actions-a rank in the bottom ten percent of account executives and discharge. Likewise, Plaintiff Thomas reportedly was subjected to two adverse employment actions-a rank in the bottom ten percent of account executives and a transfer/demotion after the Talent Assessment. Plaintiffs point to statements by Craig Hixson, Steven Russell, and George Dunlap or other supervisors as direct evidence of discrimination. The Court must determine whether these individuals were involved in the decisions to rank Plaintiffs in the bottom ten percent and take the other alleged adverse employment actions against them. See Trotter v. Bd. of Trustees, 91 F.3d 1449-1453-54 (11th Cir. 1996) ("For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision.")

The alleged adverse employment actions resulted from the Talent Assessment process. After reviewing the evidence, the Court offers the following summary of the Talent Assessment process. Mr. Russell called a meeting of the sales managers, and they were instructed to rank the account executives under their supervision, compiling a list of the top ten percent and the bottom ten percent. (Dunlap Dep. at 95-99; Chance Dep. at 51, 53, 84.) The lists were created by a consensus of the

sales managers over the course of three meetings. (Dunlap Dep. at 104; Chance Dep. at 19.) Although he did not attend the meetings in their entirety, the process was overseen by Russell. (Smith Dep. at 111 .) Ostensibly, this process was initiated to come up with a plan to improve the employees' performance, but it later became clear that the rankings would be used to reduce the number of account executives at Lucent. (Dunlap Dep. at 114.) After the Talent Assessment meetings, those employees included in the bottom ten percent list were assigned action codes like transfer, place on performance improvement plan, or exit service, among others. Action codes first were assigned by the sales managers, but the choices were subject to review and approval by upper level management including Steven Russell and Carole Spurrier. (Dunlap Dep. at 115, 121; Chance Dep. at 19, 81, 147; Spurrier Dep. at 42, 45-46; May Dep. at 77.)

Craig Hixson was a member of Defendant's management, but he did not personally participate in the Talent Assessment process. He merely offered his opinion to Clarence Harris about his subordinates. (Hixson Dep. ¶ 5.) In light of the fact that Hixson did not participate in the Talent Assessment, the Court is hesitant to classify a rumor repeated by Hixson to Chancey about Lucent's motivation as direct evidence of discrimination. Moreover, the statement attributed to Hixson is not a statement of his view but rather a statement of his opinion of why Lucent was taking certain actions. Such a statement should not be considered. On the other hand, it is undisputed that Russell and Dunlap were involved in the Talent Assessment process that resulted in the low rankings and the changes in Plaintiffs employment status. Therefore, Russell's statements about the need for young people and the

allegations by a Talent Assessment participant (Harris) that Russell wanted to surround himself with young people can be considered if the other requirements for classifying statements as direct evidence can be met. Likewise, Dunlap's indications that youth was a virtue on employment evaluations can be considered.

Next, the Court must determine whether these remarks or statements reflect a discriminatory attitude so blatantly that the only intent could be to discriminate on the basis of age. The Eleventh Circuit has held that statements about a desire to attract younger employees are not direct evidence of discrimination. Beaver v. Rayonier, Inc., 200 F.3d 723,729.30 (11th Cir. 1999); see Damon, 196 F.3d at 1359 (decisionmaker's statement that the company needed to promote "aggressive young men" not direct evidence of age discrimination because it required inference that promoting young men required terminating older employees). Therefore, Russell's statements that the company needed to attract young salespeople or praising the young, without more, are not direct evidence of a discriminatory attitude. Simply praising youth does not invite the conclusion that age is a negative factor. However, statements praising the young, when coupled with derogatory comments about older workers, can be direct evidence. See Buckley v. Hosp. Corp. of Am., Inc., 758 F.2d 1525, 1530 (11th Cir.1985) (hospital administrators statement that the hospital needed "new blood" and that the plaintiffs advancing age impeded her constituted direct evidence in ADEA case). Negative statements about protected workers have been held direct evidence of a discriminatory motive. See Wright v. Southland Corp., 187 F.3d 1287, 1303 (11th Cir. 1999) (describing how decisionmaker told plaintiff that he might want to quit his job because he was getting too

old to learn new computer system); Haynes v. W.C. Cave & Co., Inc., 52 F.3d 928, 930 (11th Cir. 1995) (finding direct evidence of discrimination where decisionmaker stated that women were not tough enough to do certain job). Since the Court will not consider Craig Hixson's comment about the "old bugs," Plaintiffs have not pointed to the derogatory statements about older workers that would be necessary to support a finding that Plaintiffs have presented direct evidence of discrimination.

Because the Court concludes that Plaintiffs have not presented direct evidence of discrimination, there is no need to consider the final inquiry, whether the statements can be tied to the adverse employment actions Plaintiffs suffered. Nonetheless, Plaintiffs cannot satisfy this requirement either because the statements described by Plaintiffs do not show that Defendant was focusing on limiting older workers. See e.g., Maddow v. Procter & Gamble Co., Inc., 107 F.3d 846, 852 (11th Cir. 1997) (statement that company was only hiring sales reps under forty was direct evidence); Lindsey v. American Cast Iron Pipe Co., 772 F.2d 799, 802 (11th Cir.1985) (director's statement that he wanted a younger person to fill the position constituted direct evidence in ADEA case). In the present case, none of the statements referenced by Plaintiffs clearly show that Defendant intended to assess the older workers less favorably or to target them for termination, forced retirement, or demotion.

The Court finds that Plaintiffs have not presented direct evidence of age discrimination. Therefore, Plaintiffs must prove their case with circumstantial evidence. Still, the evidence categorized by Plaintiffs as direct evidence can be presented as part of the circumstantial case against Defendant.

See Burrell v. Bd. of Trustees of Ga. Military College, 125 F.3d 1390, 1393 (11th Cir. 1997) (statements by a decision-maker that are not direct evidence of discrimination may still be used as circumstantial evidence of discriminatory motive).

II. Whether Plaintiffs Can Establish Their Claims Using Circumstantial Evidence

The United States Supreme Court outlined the requirements for proving employment discrimination using circumstantial evidence in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under the McDonnell analysis, a plaintiff first must establish a *prima facie* case of discrimination. 411 U.S. at 802; Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094 67 L. Ed. 207 (1981) (stating that plaintiff bears initial burden of establishing *prima facie* case of discrimination); see Benson v. Tocco. Inc., 113 F.3d 1203, 1207 (11th Cir. 1997) (stating that plaintiff must produce sufficient evidence to support inference that employer based its decision on illegal criterion to establish *prima facie* case), Establishing a *prima facie* case has the same effect as a presumption of unlawful discrimination; the employer cannot be silent but must come forward with evidence of a legitimate nondiscriminatory reason for its decision. 411 U.S. at 802; Chapman v. A.I. Transp., 229 F.3d 1012, 1024 (11th Cir. 2000); Young v. Gen. Foods Corp., 840 F.2d.825, 828 (11th Cir. 1988). When a defendant expresses one or more legitimate reasons for the action, the presumption of discrimination evaporates, and a plaintiff must raise a genuine issue of material fact as to whether the reasons offered by the defendant are pretextual. McDonnell, 411 U.S. at 804; Chapman, 229 F.3d at 1024-25; Brown v. Amer. Honda

Motor Co., 939 F.2d 946, 946 (11th Cir. 1991) (requiring plaintiff to come forward with specific evidence demonstrating that defendant's reasons are pretext for discrimination after defendant offers sufficiently probative, credible, non-discriminatory reasons for its actions). If a plaintiff establishes a *prima facie* case and proffers sufficient evidence to allow a jury to disbelieve the employer's proffered reason for the action, that alone is enough to preclude summary judgment for the employer. Benson, 113 F. 3d at 1207 (citing Combs, 106 F.3d at 1532).

A. Whether Plaintiffs Have Established a *Prima Facie* Case

In an ADEA case, a plaintiff establishes a *prima facie* case by showing that he was (1) a member of the protected age group; (2) subject to adverse employment action; (3) replaced by a younger individual or treated less favorably than a younger individual; and (4) qualified to do the job. Verbraeken v. Westinghouse Elec. Corp., 881 F.2d 1041, 1045 (11th Cir. 1989), cert. dismissed, 493 U.S. 1064, 110 S. Ct. 884, 107 L. Ed. 2d 1012 (1990); see Holifield v. Reno, 155 F.3d 1555, 1556 (11th Cir. 1997) (characterizing third criterion in terms of being treated less favorably than person without protected characteristic).

In the present case, both Plaintiffs are more than forty years of age and, therefore, members of the protected age group. Both Plaintiffs allege that they were subject to adverse employment actions. For Pike, these adverse actions included being ranked in the bottom ten percent of performers during the Talent Assessment process, being designated for inclusion in the RFS program, being reassigned, and ultimately being

discharged in the Force Management Program. The adverse employment actions suffered by Plaintiff Thomas included a ranking in the bottom ten percent of performers during the Talent Assessment, a transfer/demotion, and a substantial reduction in pay.

First, Defendant argues the rankings do not qualify as adverse actions because performance evaluations and employment rankings standing alone do not constitute adverse employment actions for the purpose of establishing a discrimination claim. Davis v. Town of Lake Park, 245 F.3d 1232, 1241 (11th Cir. 2001). Although Defendant's statement of the law is correct, the Davis court noted that such a ranking could be an adverse employment action if the ranking resulted in a "tangible consequence" like the loss of pay or benefits or further discipline. Id. at 1240; see also Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1261 (11th Cir. 2001)(stating that negative evaluation is not adverse employment action without tangible negative effect). In the present case, the testimony submitted describes the Talent Assessment as a two-step process compiling a list of the bottom ten percent and assigning each person on that list an action code ranging from "coach and develop" to "exit service." (See, e.g., Dunlap Dep. at 114-15, 121 (explaining how action codes were assigned).) These action codes were used to determine Plaintiffs' future opportunities at the company, and both Plaintiffs can argue that their assigned action codes resulted in a tangible consequences including discharge, demotion, or loss of salary. A question of fact remains as to whether the bottom ten percent rankings of Pike and Thomas suffice as adverse employment actions.

Next, Pike's designation to exit service, the alleged reassignment to a job with no duties, and ultimate discharge necessarily qualify as adverse employment actions because each changed the terms and conditions of his employment. Defendant argues that Thomas' job transfer was voluntary but does not dispute the fact of his pay cut. Because there is evidence in the record to demonstrate that Thomas took a significant pay cut and suffered a severe economic loss when he took the reassignment, Plaintiff Thomas has at least raised a genuine issue of material fact as to whether he suffered adverse employment actions when he was transferred. The facts of Plaintiffs' cases demonstrate that each suffered adverse employment action.

In analyzing the third element of the *prima facie* case, the Court first considers whether there is evidence in the record to indicate that Plaintiffs were treated less favorably than younger employees during the Talent Assessment process. Plaintiffs submit evidence demonstrating that the bottom ten percent list consisted exclusively of older managers, specifically, managers over the age of forty-seven and that the top ten percent list included four employees in their thirties. The parties' experts disagree about the significance of these facts. The fact that Dunlap was older than both Plaintiffs calls the credibility of Plaintiffs' contentions into question, but it is not the province of the Court to find facts. Because of the purportedly negative treatment of older employees and the more favorable treatment of younger employees, there is a genuine issue of material fact as to whether Plaintiffs were treated less favorably in the talent review than their younger counterparts.

The Court next considers whether Plaintiffs were treated less favorably than younger employees when they were reassigned, discharged, or demoted. In addition, the Court must determine whether there is evidence in the record to show that Plaintiffs were replaced by younger individuals or that Defendant intended to discriminate on the basis of age in deciding who to reassign or terminate.[2] Significantly, Plaintiffs Pike and Thomas were not replaced. (Lucent's Resp. to Pl.'s First Interr., No. 3; Dunlap Dec. ¶ 45.) Moreover, Dixie Riddle and George Knieriem, employees who were older than Thomas, took over his responsibilities. (Smith Dep. at 126.) Because Plaintiffs were not replaced by younger employees, in order to establish a *prima facie* case they must show that Defendant intended to discriminate on the basis of age when deciding whose jobs would be affected after the Talent Assessment. See Earley, 907 F. 2d at 1082.

Plaintiffs offer circumstantial evidence that could support an inference of intentional discrimination in the Talent Assessment process and its aftermath. First, there is evidence in the record that top Lucent officials viewed the talent review process as an opportunity to "refresh" the sales force or "refresh the business." (Spurrier Dep. at 19, 32-37, 40, 50; May Dep. at 173-75; Chancey Dec. ¶ 9.) In addition, Plaintiffs offer more than one statement by Steven Russell indicating an age bias. These statements include: (1) a statement that he needed "young, ex-military officers;"

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[2] In a reduction-in-force case, instead of considering whether a younger person replaced the plaintiff, the final criterion becomes whether the employer intended to discriminate on the basis of age in deciding who to terminate. Earley v. Champion Int'l Corp., 907 F. 2d 1077, 1082 (11th Cir. 1990).

(Knieriem Dec. ¶ 5; Chancey Dec. ¶ 5-8); and (2) a statement in a memorandum that he was "looking to bring on a couple of young, hungry, and smart people leaving military service... to move them into AE vacancies as soon as possible" and make them "the nucleus of a new AE breed." (Chance Dep. at 106,107, Ex. 36): Next, some of Lucent's employees involved in the Talent Assessment indicated that Defendant was looking for younger people and that Steven Russell wanted to surround himself with younger people, Third, written comments about employees often listed youth as a positive characteristic. (Dunlap Dep., Ex. 36, Talent Review Profiles of John P. Jones, Darren Durrett, and Brian Bouck.) Plaintiffs also point out that the Talent Review Forms did not contain any objective measures of performance but called on the evaluators to rate the employees' "ability to develop and adapt." Lucent also encouraged the recruitment of recent college graduates because of their flexibility and skill. (Chancey Dec. ¶ 17, Ex. 1.) Finally, Plaintiffs offer statistical evidence that could indicate disparate treatment of employees more than forty-seven or fifty years of age.[3]

The Court notes that the evidence offered by Plaintiffs could support an inference of intentional discrimination. See

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[3] Defendant questions the probative value of this statistical data on the basis of the age breaks used and the expert's methodology. In addition, Defendant questions the relevance of Plaintiffs' statistical data since the defined protected category under the statute includes employees aged forty or older. The Court has considered these concerns but finds that the issues raised by Defendant go to the credibility of the statistical report and the weight that might be given to the expert's opinions. These issues are for jury determination.

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153-54 (2000) (stating that age-biased comments by one person in a group can support inference of discrimination which combined with pretext evidence could allow jury to find intentional discrimination); Beaver v. Rayonier, Inc., 200 F.3d 723,729-30 (11th Cir. 1999) (noting that decisionmaker's desire to attract younger employees could support inference of discrimination when considered along with other evidence); Adams v. Ameritech Servs., Inc., 231 F.3d 414 (7th Cir. 2000) (finding that employer's layoff criterion including "potential to grow and change" invokes ageist stereotype that could support finding of intentional discrimination). Furthermore, while statistics alone cannot make a case of individual disparate treatment, statistics may support an inference of discrimination when used in conjunction with other circumstantial evidence of discrimination.

Defendant does not argue that Plaintiffs were not qualified to do their jobs at the time that these adverse employment actions occurred. In fact, Defendant's evidence shows that at least one decisionmaker did not believe that Plaintiffs' low rankings or eventual exits from service were based on poor performance. (See, e.g., Dunlap Dec. ¶ 31 .) Since Defendant Concedes the qualification element, Plaintiffs have presented enough evidence to raise a genuine issue of material fact as to each element of the *prima facie* case. Therefore, the burden shifts to Defendant to proffer legitimate nondiscriminatory reasons for Plaintiffs' bottom ten percent rankings, reassignments, and discharge or demotion.

2. Legitimate Nondiscriminatory Reason

Defendant offers several legitimate nondiscriminatory reasons for the alleged adverse actions taken against Plaintiffs. The Court will outline these reasons with regard to each Plaintiff and each adverse employment action.

Defendant gives a number of reasons for Plaintiff Pike's ranking in the bottom ten percent list. First, Dunlap states that Pike, while not necessarily a bad employee, was less valuable than other employees on the team. Dunlap gives several specific reasons for his assessment of Pike, including Pike's negative attitude, deficient skills when compared to others, and lagging product knowledge.

Next, Defendant submits that Pike's inclusion in the RFS program and later the FMP program was necessary as part of a reduction in force ("RIF") during which Plaintiff Pike's position was eliminated. A company's business decision to institute a reduction in force ("RIF") is a legitimate reason to discharge qualified employees. Furr v. Seagate Technology, Inc., 82 F. 3d 980, 986 (10th Cir. 1998) (stating that RIF is business decision and ADEA is not vehicle for reviewing RIF's propriety); see Faulkner v. Super Valu Stores, Inc., 3 F. 3d 1419, 1426-27 (10th Cir. 1993) (citing Lucas v. Dover Corp., Norris Div., 857 F. 2d 1397, 1404 (10th Cir. 1988) ("This court will not second guess business decisions made by employers, in absence of some evidence of impermissible motives."). Pike argues that the discharge was discriminatory because the account executive in the same territory that remained on staff was younger. Defendant offers several reasons for retaining Rick Gomez rather than Pike. Reportedly, Pike's attitude continued to worsen, and Gomez

was more valuable because of his superior ONG product knowledge.

During a RIF, a company is under no obligation to establish an internal transfer program or a right for senior employees to take the jobs of less senior employees. Jameson v. Arrow Corp., 75 F. 3d 1528, 1532-33 (11th Cir. 1996). If a particular job is eliminated for nondiscriminatory reasons, then plaintiff must show that he was qualified for another open job. Earley, 907 F. 2d at 1082-83. According to the Eleventh Circuit, the position must be open at the time of the discharge, and a showing that a position was open before plaintiff' s termination or several months after the termination is not enough. See Earley, 907 F. 2d at 1083 (noting that to survive summary judgment motion plaintiff must point to positions that were open at time of termination and for which he was qualified).

Defendant contends that there was no available job for Plaintiff Pike at the time of the RIF. In fact, it is undisputed that Plaintiff Pike applied for four open positions. Defendant asserts that Pike was not qualified to take any of these positions.

In addition, Defendant offers several legitimate nondiscriminatory reasons for Plaintiff Thomas' bottom ten percent ranking. Allegedly, in comparison with other members of the team, Plaintiff Thomas lacked ONG product knowledge, was reluctant to take on new responsibilities and learn new skills, and lacked presentation skills. Defendant argues that Thomas' job transfer was voluntary and not an adverse employment action. However, the Court considers the demotion an adverse employment action and assumes

Defendant would offer the same reasons for choosing to demote Plaintiff Thomas.

3. Pretext

To satisfy their burden, Plaintiffs must cast doubt on the proffered reasons, submitting evidence that would permit a reasonable fact finder to conclude that the employer's reasons did not in truth motivate his conduct. Tidwell v. Carter Prods., 135 F. 3d 1422, 1427 (11th Cir. 1998); Hairston v. Gainesville Sun Pub. Co., 9 F. 3d 913,921 (11th Cir. 1993). In other words, Plaintiffs must demonstrate that a factfinder could determine that the employer's reasons lack credibility. Combs v. Plantation Patterns, 106 F. 3d 1519, 1528 (11th Cir. 1997); See Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F. 3d 436, 444 (11th Cir. 1996) (stating that plaintiff should introduce evidence directed to veracity of employer's justification).

Generally, Plaintiffs argue that the talent review was a pretext for discrimination because the evaluators for the talent assessment were provided no objective criteria to guide deliberations and the profile forms were manipulated to match the rankings. In addition, Plaintiffs repeat the evidence used to establish their prima facie cases-allegedly ageist comments and statistical evidence-as evidence of pretext.

Even if the evaluators were given no standards for reviewing the employees, such a situation does not invite the inference that the reviewers would choose who would be placed on the bottom ten percent list by looking at employees' ages. In addition, the manipulation of the profile sheets to match the lists does not suggest that age was a motivating

factor in the process. Moreover, the ageist comments and statistical evidence in combination were enough to establish Plaintiffs' *prima facie* case, but, once Defendant has offered legitimate nondiscriminatory reasons for its actions, Plaintiffs must produce additional evidence to show that these reasons did not actually motivate the employer's conduct. The assertions that the Talent Assessment process were standardless, that the evaluations were manipulated to match the decisions that had been made, that ageist comments had been made, and that statistics could support a finding of discrimination against those employees over forty-seven[4] is not enough to satisfy Plaintiffs burden of showing pretext.

Specifically, to rebut Defendant's nondiscriminatory reasons for ranking him in the bottom ten percent, Plaintiff Pike offers his opinion that his attitude was not negative and his skills and knowledge were up to speed. Likewise, Plaintiff Thomas offers his opinion that his skills and product knowledge were adequate and that his performance was satisfactory. Both Plaintiffs offer good evaluations and accolades as evidence of pretext, asserting that Defendant cannot produce serious criticisms of plaintiffs that predate the Talent Review.

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[4] Defendant argues that the statistical evidence included in the report of Plaintiffs' expert is not relevant when considering the facts of Plaintiffs' cases. The Court has reviewed the report, but the databases examined are simply labeled with numbers. Therefore, without more information, the Court cannot determine how these statistics relate to the adverse employment actions allegedly suffered by Plaintiffs. Nonetheless, the statistics alone are not enough to raise a question of fact on the issue of pretext.

Courts routinely find that a plaintiff cannot rebut an employer's legitimate reasons for an action with his subjective beliefs or opinions. Lee v. GTE Fla., Inc., 226 F.3d 1249, 1254 (11th Cir. 2000) (explaining that plaintiff's own opinions about his qualifications do not give rise to material factual dispute); Ramsey v. Leath, 706 F.2d 1166, 1170 (11th Cir. 1983). Evidence of satisfactory performance also does not help Plaintiffs raise a genuine issue of material fact as to pretext. Defendant concedes that Plaintiffs had been good employees, but the nature of the Talent Assessment process and the subsequent reduction in force was that satisfactory employees could suffer negative consequences if they compared poorly to other employees.

In addition, Plaintiffs assert that the bottom ten percent list included mostly older workers and the top ten percent list included younger employees. Plaintiffs ignore the fact that the top ten percent list also included one of the oldest workers. Plaintiffs argument is further undermined by the fact that the main decisionmakers were older than Plaintiffs. When questioned about the rankings, Thomas offered several older employees that he believed should have been ranked lower than him.

In attempting to demonstrate pretext, Plaintiffs reiterate the alleged existence of a directive from Steven Russell to purge older workers. There is no evidence of such a plot beyond Plaintiffs' speculations. Moreover, courts look skeptically at elaborate plot theories when no evidence is presented to support the existence of a conspiracy. Konowitz v. Schnadig Corp., 965 F.2d 230, 234 (7th Cir. 1992); McCoy v. WGN Continental Broadcasting Co., 957 F.2d

368, 372 (7th Cir.1992); Gould v. Kemper Nat. Ins. Companies, 880 F.Supp. 527, (N.D.Ill. 1995).

Next, Pike fails to put forth evidence that Gomez was not a more valuable employee. Therefore, Pike cannot show that Defendant's decision to retain Gomez in the account executive position was a pretext for discrimination against Pike. Moreover, Pike did not present evidence to demonstrate that the persons who received the available jobs that he applied for during the RIF were less qualified for the positions than Pike. In fact, Pike has not even stated which employees were hired for those positions. Without such evidence, Pike cannot meet his burden to show that Defendant's nondiscriminatory reason for terminating him, a reduction in force and a lack of available jobs, was a pretext for discrimination.

Plaintiffs have failed to submit sufficient evidence to allow a jury to find that Defendant's proffered reasons for the actions taken against Plaintiffs were a pretext for discrimination.[5] Therefore, Plaintiffs have failed to carry their burden under McDonnell, and Defendant's Motions for Summary Judgment [41-1] and [42-1] are hereby **GRANTED**.

Conclusion

Defendant's Motion for Summary Judgment on Plaintiff Thomas' Claims [41-1] is hereby **GRANTED**; Defendant's Motion for Summary Judgment on Plaintiff Pike's Claims [42-1] is hereby **GRANTED**; Defendant's Motion To Strike Supplemental Report of Dr. John Miller [52-1] is hereby

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[5] Plaintiffs' state law claims would be analyzed under the same standards, and those claims are also subject to dismissal.

DENIED. Defendant's Motion for Reimbursement of Costs for Expert Databases [57-1] is hereby **GRANTED**, and Plaintiffs are hereby **ORDERED** to remit $5,950.00 to Defendant. Plaintiffs' Motion To Strike Defendant's Reply to Plaintiffs' Joint Statement of Material Facts [62-1] is hereby **DENIED**.

SO ORDERED, this day of August, 2002.

/s/ _____
RICHARD W. STORY
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 1:00-CV-1406-RWS

[Filed November 6, 2001]

JERRY R. PIKE and PATRICK A. THOMAS, Individually and on behalf of others similarly situated,	)
Plaintiffs,	)
v.	)
LUCENT TECHNOLOGIES, INC.,	)
Defendant.	)

ORDER

Plaintiffs bring this action, on behalf of themselves and others similarly situated, alleging a pattern and practice of intentional age discrimination. Plaintiffs filed the Complaint on June 5, 2000, asserting collective action claims. Before filing the suit, Plaintiffs filed charges with the Equal Employment Opportunity Commission ("EEOC"), and they

were issued a "notice of right to sue" letter. Plaintiffs allege that the Complaint was filed within ninety (90) days of the receipt of this right to sue letter. Before the Court for consideration is Defendant's Motion To Dismiss Plaintiff's Collective Action Allegations [31-1]. After reviewing the record and considering the arguments of the parties, the Court enters the following Order.

Standard for Decision

Federal Rule of Civil Procedure 12(b)(6) empowers the Court to grant a defendant's motion to dismiss when a complaint fails to state a claim upon which relief can be granted. In considering whether to grant or deny such a motion, the Court may only look to the pleadings. Fed. R. Civ. P. 12(b). The pleadings are, in addition, construed broadly so that all facts pleaded therein are accepted as true and all inferences are viewed in a light most favorable to the nonmoving party. Cooper v. Pate, 378 U.S. 546, 546, 84 S. Ct. 1733, 12 L. Ed. 2d 1030 (1964). Thus, a motion to dismiss should be granted when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). Motions to dismiss are disfavored. Gasper v. Louisiana Stadium and Exposition Dist., 577 F. 2d 897, 900 (5th Cir. 1978);[1]

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[1] The United States Court of Appeals for the Eleventh Circuit adopted as binding precedent the decisions of the United States Court of Appeals for the Fifth Circuit handed down prior to September 30, 1981. Bonner v. City of Prichard, Ala., 661 F. 2d 1206, 1207 (11th Cir. 1981)

Woodham v. Fed. Transit Admin., 125 F. Supp. 2d 1106, 1108 (N.D. Ga. 2000).

Discussion

Defendant moves for dismissal of Plaintiffs' collective action allegations, arguing that Plaintiffs did not follow the proper procedure to commence a collective action. In determining whether this motion should be granted, the Court must focus on when an action is commenced under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*

Generally, ADEA requires a plaintiff to commence an action within ninety (90) days of receiving a right to sue letter from the EEOC. 29 U.S.C. § 626(e). An individual action is commenced upon the filing of a complaint. Grayson v. Kmart Corp., 79 F.3d 1086, 1105 (11th Cir. 1996) (citing O'Connell v. Champion Int'l Corp., 812 F.2d 393, 394 (8th Cir. 1987)). In contrast, more than filing a complaint is necessary to commence a collective action. With regard to collective actions, the ADEA incorporates portions of the Fair Labor Standards Act ("FLSA"), including the provision that governs when an action is commenced. Grayson, 79 F.3d at 1106; See 29 U.S.C. § 256 (defining when action is commenced). Pursuant to FLSA's provision governing the commencement of actions, a collective action is commenced when a named plaintiff files both a complaint and a written consent to become a party plaintiff. 29 U.S.C. § 256(a).[2]

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[2] The code section reads, in pertinent, part:

In determining when an action is commenced for the

In this case, Plaintiffs assert that they seek relief for themselves and others similarly situated. Nonetheless, Plaintiffs simply filed the Complaint and did not file the written consents required by the statute. Therefore, no collective action was commenced, and Plaintiffs cannot represent other parties not named in this action.

Plaintiffs argue that 29 U.S.C. § 256 cannot be applied to ADEA claims because, by its terms, the statute only applies to statute of limitations calculations under 29 U.S.C. § 255. According to Plaintiffs, when Congress amended the ADEA in 1991, section 255 was deleted from the list of FLSA provisions applicable to the ADEA. The amendment replaced the two- or three-year statute of limitations provided by section 255 with a ninety (90) day limit. Plaintiffs assert that because section 255 no longer applies in ADEA cases, section

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> purposes of section 255 of this title, an action commenced on or after May 14, 1947...shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action...it shall be considered commenced in the case of any inficidual claimant -
>
> > (a) on the date when the complaint if filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
> >
> > (b) if such written consent was not so filed or if his name did not so appear - on the subsequent date on which such written consent is filed in the court in which the action was commenced.

256 also cannot be used to determine when an action is commenced under the ADEA. Plaintiffs' contention, though appealing, fails to convince the Court. Courts incorporate section 256 into the ADEA based on the collective action provisions of 29 U.S.C. § 216(b). Section 255 provides the statute of limitations for FLSA actions generally; hence, when Congress wanted to change the time limit for ADEA actions, the amendment expressly provided that section 255 would no longer be incorporated into the ADEA. The mere modification of the statute of limitations for ADEA claims did not affect the procedure, provided in 29 U.S.C. § 256, for commencing a collective action. FLSA's collective action procedures were applied to ADEA collective actions prior to the 1991 amendments; therefore, if Congress wanted to provide a different rule for commencing an ADEA collective action, they could have done so. Nothing in the current statute prevents courts from applying section 256 to ADEA actions. Since Plaintiffs failed to satisfy the requirements for commencing a collective action, the claims for collective relief must be dismissed.

Defendant also urges the court to dismiss Plaintiffs' individual claims, contending that the failure to file the consents is also fatal to the individual claims. There is legal precedent supporting Defendant's argument. Some courts have held that named plaintiffs purporting to bring a collective action cannot pursue their individual claims if they do not file written consents within the limitations period. Bonilla v. Las Vegas Cigar Co., 61 F. Supp. 2d 1129, 1132-33 (D. Nev. 1999); see Lee v. Advance Executive Prot., Inc., 2001 WL 108760, at *5-6 (4th Cir. 2001) (calculating statute of limitations from filing of consents even for named plaintiffs in collective action); In re Food Lion, Inc., 1998 WL 322682,

at * 12-13 (4th Cir. 1998) (stating that consents were required for named plaintiffs to join collective action even though they would not have been necessary for action pursued individually); Archer v. Sullivan County, 1997 WL 720406, at *2 (6th Cir. 1997) (declaring that collective action commenced when named plaintiffs filed consents); Salazar v. Brown, 1996 WL 302673, at *9 (W.D. Mich. 1996) (distinguishing individual and collective actions under FLSA and deciding that named plaintiffs were required to file consents to commence action when they intended to bring collective action); Wertheim v. Arizona, 1993 WL 603552, at *7 (D. Ariz. 1993) (finding that statute of limitations continues to run as to named plaintiff of putative collective action until he files written consent).

On the other hand, some courts have adopted a different view, dismissing claims for collective relief when the named plaintiffs failed to file consents but allowing the claims of the individual plaintiffs to go forward. See Songu Mbwira v. Davis Memorial Goodwill Indus., 144 F.R.D. 1, 2 (D.D.C. 1992) (striking class action allegations when consent was not filed timely but allowing plaintiff to proceed on individual claim); Perella v. Colonial Transit, Inc., 148 F.R.D. 147, 150 (W.D. Pa. 1991) (finding that consent requirement only applied to collective actions and timely filed complaint commenced purported class representative's individual claims).

As pointed out by Defendant, several Courts have adopted the view that individual plaintiffs intending to pursue a collective action must file the required consents or risk losing their individual claims; however, no case cited by Defendants constitutes binding precedent for this Court. Significantly,

only one case espousing this view is published, and the text of the others can be found only on Westlaw. This Court is hesitant to follow the courts who would deny individual plaintiffs a right to relief simply because they intended to represent others and failed to abide by the procedure for representative action. If Plaintiffs simply wished to pursue their own claims, their action would have commenced simply by filing the Complaint. A more logical conclusion is the one adopted by the Songu and Perella courts. This Court finds that Plaintiffs commenced their individual actions by filing the Complaint. Had Plaintiffs filed written consents within the ninety (90) day limitation period, Plaintiffs also could have represented other employees; however, because they failed to file the consents, the collective action never commenced. Penalizing Plaintiffs for seeking to include others could result in an "every employee for himself" attitude and could lead to a proliferation of individual lawsuits. Moreover, discouraging collective actions takes away an important tool that groups of employees traditionally use to remedy systemic discrimination. Thus, Plaintiffs' individual ADEA claims are not subject to dismissal because the Complaint was filed before the ninety (90) days expired.

Even though Plaintiffs' individual actions appear to be timely filed, Defendant asserts that Plaintiffs averred only a collective ADEA claim. This contention is unsupportable. The style of the Complaint states that the action is asserted, "Individually and on behalf of others similar situated." That phrase alone should have alerted Defendant that Plaintiffs are pursuing individual claims. Even so, the remaining allegations of the Complaint also show that Plaintiffs seek individual as well as collective relief. Plaintiffs include general allegations about Defendant's alleged scheme to purge older workers, and

these general allegations are followed by accounts of Plaintiffs' personal experiences. See Compl. ¶¶ 14-21 (alleging discriminatory practices); Compl ¶¶ 22-29 (recounting Plaintiff Pike's experience); Compl. ¶¶ 30-36 (describing Plaintiff Thomas's situation). These specific individual accounts were not necessary if Plaintiffs only sought relief for generalized discrimination within the company. Plaintiffs claim entitlement to relief under the ADEA, stating, *inter alia,* "Each of the plaintiffs was discriminated against on account of his age, in violation of Sections 4(a)(1) and (2) of the ADEA. 29 U.S.C. § 623 (a)(1) and (2)." (Compl. ¶ 38.) Since there are two named plaintiffs, the allegation of discrimination against "[e]ach of the plaintiffs" could refer to discrimination against both named Plaintiffs or discrimination against the named Plaintiffs and others not named. Therefore, the claim for relief under the ADEA is sufficient to allege individual ADEA claims as well as collective claims.

Conclusion

Accordingly, Defendant's Motion to Dismiss [31-1] is **GRANTED in part and DENIED in part**. For the foregoing reasons, the collective action allegations in the Complaint are hereby **DISMISSED**. Plaintiffs may proceed with their individual claims under the ADEA and state law.

On July 23, 2001, the Court Stayed discovery to allow the parties to pursue mediation. Counsel have advised the Court that they have been unable to resolve the case through, mediation. Therefore; it is appropriate to lift the stay on discovery. It is therefore **ORDERED** that the stay on discovery be lifted, and that discovery be commenced upon

entry of this Order and expire thirty-six (36) days thereafter, unless otherwise ordered by the Court.

SO ORDERED, this 31st day of October, 2001.

/s/ _____
Richard W. Story
United States District Judge